IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 17, 2007 Session

# STATE OF TENNESSEE v. JEFFREY MARK KLOCKO

**Appeal from the Criminal Court for Davidson County**
**No. 2004-B-961 J. Randall Wyatt, Jr., Judge**

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**No. M2006-01359-CCA-R3-CD - Filed June 16, 2008**

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Appellant was convicted by a Davidson County jury of three counts of aggravated sexual battery, six counts of sexual battery by an authority figure and one count of assault by offensive or provocative contact in connection with allegations made by his step-daughter, A.R., and her friend, B.M. Following a sentencing hearing, the trial court sentenced Appellant to eight years for each aggravated sexual battery conviction, to be served concurrently, three years for each sexual battery by an authority figure conviction, two of those terms to be served consecutively to each other and consecutively to the concurrent eight-year sentences. The remaining sentences were all ordered to be served concurrently. Appellant's effective sentence was fourteen years. On appeal, Appellant argues that the trial court erred in: (1) denying his motion pursuant to Rule 412 of the Tennessee Rules of Evidence concerning A.R.'s prior sexual conduct; (2) denying his motion for judgment of acquittal upon the close of the State's proof; (3) overruling his objections to certain questions asked by the State and allowing the State to make inflammatory statements during closing and rebuttal arguments; and (4) sentencing Appellant to consecutive sentences. We affirm the trial court's denial of Appellant's motion under Rule 412 and motion for judgment of acquittal. We likewise find no prosecutorial misconduct that warrants the reversal of Appellant's convictions. We have, however, determined that Appellant's case must be remanded for resentencing because the trial court failed to make findings with regard to the imposition of consecutive sentencing. We affirm the Appellant's convictions in all other respects. Therefore, we affirm in part, vacate Appellant's sentence, and remand for resentencing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Trial Court is Affirmed in Part; Vacated in Part and Case Remanded.**

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Patrick T. McNally, Nashville, Tennessee, for appellant, Jeffrey Mark Klocko.

Robert E. Cooper, Jr., Attorney General & Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, District Attorney General, and Brian Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

*Factual Background*

The victim, A.R.[1], was born on September 3, 1989. When she was two or three years old, Appellant began dating A.R.'s mother, L.R. At some point, Appellant moved in with A.R. and her mother. L.R. married Appellant when A.R. was nine years old. L.R. and appellant had a son, M.K.

When A.R. was eleven years old, Appellant began to run his hands down her back and grab her buttocks, over her clothes, when he would give A.R. a hug. No one else was present when this occurred. Appellant also "smacked" A.R.'s buttocks and called it a "love tap." A.R. stated that these things occurred on an everyday basis. This behavior made A.R. uncomfortable.

Sometime prior to her thirteenth birthday, Appellant also began touching A.R.'s breasts. Appellant would hug A.R. from behind and put his hands on her breasts on top of her clothes. This happened a couple of times either in A.R.'s bedroom or in the kitchen. A.R. would tell Appellant to stop or try to remove his hands, but he ignored her requests.

A.R. told her mother about Appellant's behavior. L.R. said she would talk to Appellant. However, the behavior did not stop. When A.R. told Appellant she would tell her mother, he told A.R. that her mother would not believe her.

The touching continued after A.R.'s thirteenth birthday. One occasion occurred when A.R. was putting the dishes away. Appellant wrapped his arms around her from behind and grabbed her breasts with both of his hands. He also grabbed her buttocks from behind while the two were in the kitchen.

A.R. also remembered several incidents that happened in her bedroom. Appellant walked into A.R.'s bedroom while she was changing clothes, and he grabbed her buttocks. Eventually, Appellant began getting in bed with A.R. in the early morning before he left for work. He got into bed with her about once a week. On one occasion, Appellant got into bed with A.R. and began rubbing her buttocks over her clothes. Another time, Appellant got into bed with A.R. and put his hands inside A.R.'s pants and rubbed her buttocks under her clothes. He also would touch her

[1] It is the policy of this Court to refer to minor victims by their initials. For privacy reasons, we will also refer to the victim's mother and brother by their initials.

breasts both over and under her clothes when he got into bed with her. One time, A.R. had worn a bra to bed. Appellant put his hand under her shirt and inside her bra in order to fondle her breasts.

One morning Appellant had been fondling A.R.'s breasts and buttocks and rolled over on his back and masturbated while in her bed. As he did this, Appellant talked to himself. A.R. testified that Appellant said that "it felt good and he wanted to come inside [the victim]." A.R. did not turn around but heard a "rubbing and stroking kind of noise."

There were two incidents when Appellant was in A.R.'s bed and touched her genitals. On one occasion, Appellant was fondling her breasts and moved his hand to her genitals and touched A.R. over her clothes. Another time, A.R.'s back was to Appellant, and he was rubbing A.R.'s buttocks. Appellant moved his hands around her waist and underneath her clothes. Appellant then touched the upper part of her genitals. A.R. closed her legs, and Appellant got out of the bed.

A.R. remembered her mother finding Appellant in A.R.'s bed in the early morning when he would fondle her. A.R.'s mother told him to get up because it was inappropriate.

A.R. had a friend, B.M., who came over to work on a school project in the spring of 2003. A.R. saw Appellant smack B.M. on the buttock while B.M. was getting a drink. B.M. acted shocked. A.R.'s mother told Appellant it was inappropriate. B.M. also recounted the story. She testified that when she was at A.R.'s house, Appellant "walked by and slapped [her] butt." B.M. was shocked. A.R.'s mother did not condone Appellant's behavior, but Appellant walked off laughing.

B.M. stated she had witnessed Appellant slapping A.R.'s buttocks. B.M. also saw Appellant yell at A.R. and be impatient with her "fairly often." A.R. told B.M. that Appellant made her feel uncomfortable sometimes. A.R. also told B.M. that Appellant had touched her on her buttocks.

A.R.'s mother stated that A.R. and Appellant had a good relationship until A.R. was between ten and twelve years old. Around that time, Appellant became verbally abusive towards A.R. and called her things such as "stupid," "bitch," "whore," and "worthless piece of crap." L.R. stated that Appellant's comments caused A.R. to lose confidence in herself. A.R. often became upset and cried. Appellant also began making comments to A.R. about what "nice cleavage" she had and that A.R. had "boobies." A.R. told him she did not like his comments and L.R. told him it was inappropriate, but Appellant did not stop his behavior. L.R. also stated that Appellant often opened A.R.'s bedroom door when she was changing clothes.

L.R. saw Appellant touch A.R.'s buttocks when he hugged her. A.R. complained to L.R. that Appellant touched her buttocks, breasts and vaginal area. L.R. told Appellant to stop, but Appellant denied touching A.R.'s breasts or vaginal area. L.R. found Appellant in A.R.'s bed twice. He said he was drunk and disoriented. L.R. also remembered that Appellant had touched B.M. on the buttocks while B.M. was at their house. Even though L.R. knew this information, she never reported Appellant's behavior to the police.

On September 29, 2003, shortly after A.R.'s fourteenth birthday, Gina Nicole Proffitt, A.R.'s volleyball coach drove A.R. home after a volleyball game. While they were in the car, A.R. told Ms. Proffitt she did not want to go home. A.R. then told Ms. Proffitt that Appellant had been touching her inappropriately. Ms. Proffitt reported the information to the Department of Human Services.

The following day, September 30, 2003, Autumn Moultrie, a case manager with Child Protective Services, came to A.R.'s volleyball practice to interview her. During the interview, A.R. told Ms. Moultrie that Appellant touched her on her buttocks, her vaginal area and her chest. A.R. told Ms. Moultrie that Appellant hugged her and grabbed her buttocks almost everyday. In the interview, A.R. stated that Appellant touched her under her clothes on her buttocks, breasts and vaginal area. A.R. also told Ms. Moultrie about Appellant masturbating in her bed. A.R. also told of the incident with B.M.

Detective David Zoccola is a detective with the Metro Nashville Police Department. After Ms. Moultrie interviewed A.R., Detective Zoccola was called to the scene because A.R. was going back into the home. Ms. Moultrie recounted the information she received from A.R. during the interview. They decided that Detective Zoccola would stay at A.R.'s volleyball practice to speak with L.R. He interviewed L.R. in his police car. When Ms. Moultrie and Detective Zoccola informed L.R. of the allegations, she became upset. She then began to relate what she had observed in her household with regard to Appellant and A.R. After interviewing L.R., Ms. Moultrie and Detective Zoccola went to A.R.'s home. Detective Zoccola interviewed Appellant at that time.

On April 16, 2004, the Davidson County Grand Jury indicted Appellant with multiple counts of sexual battery. A jury trial was held February 7-9, 2005. The above facts were related to the jury. Appellant testified in his defense. Appellant denied touching A.R.'s breasts and vaginal area. Appellant categorically stated that he "never tried to touch [A.R.] in a sexual manner, ever." He did admit touching A.R.'s buttocks. Appellant stated it was L.R.'s idea for him to get into bed with A.R. He stated he got into bed with her three times to give her a hug and a kiss on the cheek. Appellant also testified that A.R. was having problems with lying to him and L.R. and having problems in school. Appellant also denied touching B.M.'s buttocks. He also stated that his twin brother, John Klocko, was present when B.M. was at the house. Appellant denied that L.R. said anything to him about the inappropriateness of touching B.M. On cross-examination, Appellant stated that he was innocent and that all the other witnesses were lying.

Appellant's brother, John Klocko, testified that he was at Appellant's house three or four times a week. He stated that A.R. was disrespectful and lied to Appellant and L.R. Mr. Klocko stated that Appellant never touched B.M. the night she was at the house with A.R. He also stated that L.R. did not speak with Appellant about touching B.M. John Klocko stated he had never seen his brother act inappropriately with regard to A.R. On cross-examination, John Klocko admitted that he did not speak with the police, the District Attorney's Office or the Department of Social Services about his knowledge of the situation in the year or so since he learned of the allegations with regard to A.R. and B.M. Mr. Klocko did not step forward until the trial.

Detective Zoccola testified on rebuttal that Appellant never mentioned during the interviews that John Klocko was present at the time of the incident with B.M. and could state that it did not happen.

The jury convicted Appellant of three counts of aggravated sexual battery, six counts of sexual battery by an authority figure, and one count of assault by offensive or provocative contact. At the conclusion of a sentencing hearing held March 18, 2005, the trial court sentenced Appellant to eight years for each aggravated sexual battery conviction, to be run concurrently to each other. The trial court also sentenced him to three years for each sexual battery by an authority figure conviction, one to run consecutively to the aggravated sexual battery sentences, one to run consecutively to the first sexual battery by an authority figure sentence and the remainder to run concurrently to the aggravated sexual battery sentences. Appellant was also sentenced to six months for the sexual battery conviction to be served concurrently to the aggravated sexual battery sentence. This was an effective sentence of fourteen years. Appellant timely filed a notice of appeal.

## ANALYSIS

### Rule 412

Appellant's initial issue is that the trial court erred in granting the State's motion in limine and denying his motion pursuant to Rule 412 of the Tennessee Rules of Evidence. The State argues that this evidence would have been overly prejudicial and minimally probative and that, therefore, the trial court's decision should be affirmed.

On February 3, 2005, Appellant filed a motion requesting to cross-examine the victim regarding her having had sexual intercourse with her seventeen-year-old boyfriend several days before the complaint was filed. Appellant stated in the motion that proof of the incident with the seventeen-year-old boy was needed to show knowledge of sexual matters pursuant to Rule 412(c)(4)(ii) of the Tennessee Rules of Evidence. The State subsequently filed a motion in limine on February 7, 2005, requesting that the trial court rule that Appellant make no statements regarding A.R.'s previous sexual activity.

The trial court held a hearing on the motion. Initially, the trial court pointed out that Rule 412 requires a defendant to file a motion no later than ten days before the trial. Appellant filed the motion on February 3, 2005, which was clearly not ten days before February 7, 2005, the date the trial was scheduled. Appellant's attorney argued that he had actually put the motion in the mail on January 31, 2005. This date is also less than ten days before the trial was scheduled. The State, however, wanted a hearing on the motion instead of having the motion dismissed based upon Appellant's failure to comply with the filing deadlines. The State wanted the hearing on the merits so that the issue would not come up at a later time. Therefore, the trial court held a hearing on the merits.

During the hearing, Appellant asked to introduce evidence about A.R.'s sexual experience with her seventeen-year-old boyfriend. Appellant's evidence was based upon a transcript of a deposition held in connection with proceedings involving the Department of Human Services. In the deposition, A.R. was asked if she had had sexual relations with her boyfriend before the allegations were made and she replied, "I believe so." Appellant asserted at the hearing on his Rule 412 motion that A.R.'s reply was an affirmative response.

Following the hearing, the trial court filed a written order denying the Rule 412 motion. In this order, the trial court stated the following:

> The Court finds that the Defendant is charged with three counts of Aggravated Sexual Battery and seven counts of Sexual Battery by an Authority Figure, alleging that the Defendant engaged in unlawful sexual conduct with the victim, [A.R.]. The Court is of the opinion that the nature of the charges, alleging only an unlawful touching, do not require the level of knowledge of sexual matters that are involved in sexual intercourse or other acts of sexual penetration. The Court is further of the opinion that the victim, at fourteen years of age, would have obtained the requisite level of knowledge to understand the improper touching involved in a sexual battery offense as opposed to a sexual offense, such as rape of a child, which involves sexual penetration. In short, the victim's incident of sexual intercourse would not demonstrate an extraordinary knowledge of sexual matters or a vocabulary that would be unusual for a fourteen year old individual. The Court is of the opinion that the probative value of the proffered evidence is far outweighed by its prejudicial effect of stigmatizing the victim for a past sexual act with no relation to the present charges involving the Defendant. The Court is therefore of the opinion that Rule 412 of the Tennessee Rules of Evidence precludes the questioning of the victim, [A.R.], about engaging in sexual intercourse with the seventeen year old male.

We begin our analysis by observing that Tennessee Rule of Evidence 412 provides in pertinent part:

> (c) Specific Instances of Conduct. Evidence of specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:
>
> (1) Required by the Tennessee or United States Constitution, or
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> (2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and

only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or

(3) If the sexual behavior was with the accused, on the issue of consent, or

(4) If the sexual behavior was with persons other than the accused,

(i) to rebut or explain scientific or medical evidence, or

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

(iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented.

Tenn. R. Evid. 412(c). In addition, Tennessee Rule of Evidence 412 also states:

> If the court determines that the evidence which the accused seeks to offer satisfies subdivisions (b) or (c) and that the probative value of the evidence outweighs its unfair prejudice to the victim, the evidence shall be admissible in the proceeding to the extent an order made by the court specifies the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

Tenn. R. Evid. 412(d)(4).

As recognized by Rule 412(c)(1), there are instances where otherwise inadmissible evidence must be admitted in order to protect the constitutional rights of the accused. *See Chambers v. Mississippi*, 410 U.S. 284, 295-96 (1973); *State v. Brown*, 29 S.W.3d 427, 436 (Tenn. 2000). Our state supreme court has stated:

> The facts of each case must be considered carefully to determine whether the constitutional right to present a defense has been violated by the exclusion of evidence. Generally, the analysis should consider whether: (1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; and (3) the interest supporting exclusion of the evidence is substantially important.

*Brown*, 29 S.W.3d at 433-34 (citing *Chambers*, 410 U.S. at 298-301). This Court must consider and balance the principles of relevance and hearsay under the Tennessee Rules of Evidence with the rights of the accused to confront and cross-examine witnesses and to call witnesses in his defense when determining whether the evidence is admissible.

We again observe that Appellant's stated purpose for seeking to introduce the contested additional information was "to prove or explain knowledge of sexual matters." *See* Tenn. R. Evid. 412(c)(4)(ii). According to the Advisory Commission Comments, this provision:

> [W]ill most frequently be used in cases where the victim is a young child who testifies in detail about sexual activity. To disprove any suggestion that the child acquired the detailed information about sexual matters from the encounter with the accused, the defense may want to prove that the child learned the terminology as the result of sexual activity with third parties.

Tenn. R. Evid. 412(c)(4), Advisory Comm'n Cmts.

We observe that "[t]rial judges are empowered with great discretion regarding the trial process, including the scope of cross-examination," and that such "discretion will not be disturbed unless an abuse" thereof is found. *State v. Williams*, 929 S.W.2d 385, 389 (Tenn. Crim. App. 1996) (citing *State v. David A. Scott, III*, No. 01C01-9202-CR-00053, 1993 WL 31990, at *5 (Tenn. Crim. App., at Nashville, Feb. 11, 1993), *perm. app. denied* (Tenn. June 1, 1993)). We further note that the Advisory Commission Comments to Rule 412 explain that this rule was designed to "strike a balance between the paramount interests of the accused in a fair trial and the important interests of the sexual assault victim in avoiding an unnecessary, degrading, and embarrassing invasion of sexual privacy." These dual sets of interests are vitally important and are to be carefully weighed by the trial court in making these decisions.

In denying Appellant's motion to introduce evidence of A.R.'s sexual behavior with her boyfriend, the trial court reasoned that Appellant was accused of sexual battery of the victim, not engaging in sexual intercourse with the victim. The court concluded that most fourteen-year-old girls would already have a certain amount of knowledge regarding sexual behavior. We agree with the trial court. There was no reason to expose the victim to the embarrassment of admitting to engaging in sexual intercourse with her boyfriend when Appellant was not even accused of engaging in sexual intercourse with the victim. Appellant's stated purpose for cross-examining the victim regarding her previous sexual activity was to demonstrate her knowledge of the subject. As stated in the Advisory Commission Comments, the use of Rule 412 for this purpose is primarily geared toward young children. At the age of thirteen and fourteen, the adolescent victim could no longer

be considered a young child. After reviewing the record provided, we conclude that the trial judge in this case took great care to protect the concerns of both Appellant and the victim.

Therefore, this issue is without merit.

**Motion for Judgment of Acquittal**

Appellant next argues that the trial court erred in denying his Motion for Judgment of Acquittal. The State argues that the there was sufficient evidence at the close of the State's proof from which a trier of fact could find Appellant guilty.

This Court has noted that "[i]n dealing with a motion for judgment of acquittal, unlike a motion for a new trial, the trial judge is concerned only with the legal sufficiency of the evidence and not with the weight of the evidence." *State v. Hall*, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). The standard for reviewing the denial or grant of a motion for judgment of acquittal is analogous to the standard employed when reviewing the sufficiency of the convicting evidence after a conviction has been imposed. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995).

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

Appellant was indicted for three counts of aggravated sexual battery, seven counts of sexual battery by an authority figure, and one count of sexual battery. At the conclusion of the State's proof, but before an election of offenses was made, Appellant made a Motion for a Judgment of

Acquittal. The trial court ruled that the evidence was sufficient for a jury to decide the case. The trial court stated that it would await the State's election of offenses, but if the State covered all the different counts, the ruling would stand. The State made the following election of offenses:

> Count 1 . . . Aggravated Sexual Battery of a child . . . . The defendant rubbed both of his hands over the buttocks of [A.R], over her clothes. This incident occurred in her bedroom when she and the defendant were alone together. The defendant was in front of [A.R.] and reached his hands around her to hug her, and then ran his hands down to her buttocks and rubbed her buttocks. This incident happened before [A.R.] turned thirteen years old.
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> Count 2 . . . Aggravated Sexual Battery of a child . . . . The defendant rubbed both of his hands over the clothed breast[s] of [A.R.] . . . . This incident occurred in her bedroom when she and the defendant came into her bedroom while she was doing homework on her bed, came up from behind, and placed his hands over her breast[s] and rubbed on them. This incident happened before [A.R.] turned thirteen years old.
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> Count 3 . . . Aggravated Sexual Battery of a child . . . . The defendant squeezed the clothed breast[s] of [A.R.], with both of his hands. This incident occurred in her bedroom while – when she and the defendant were alone together. This incident happened before [A.R.] turned thirteen years old.
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> Count 4 . . . Sexual Battery by an Authority Figure . . . . The defendant grabbed the buttocks of [A.R.] with both his hands. [A.R.] was changing her clothes in her bedroom. And the defendant came in and gave her a hug. The defendant placed both of his hands on her buttocks. And she pushed the defendant away. This incident happened after [A.R.] turned thirteen years old.
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> Count 5 . . . Sexual Battery by an Authority Figure . . . . The defendant grabbed both of [A.R.'s] breasts with his hands over her clothes. This incident occurred in the kitchen of the house when [A.R.] had reached up to put dishes away. The defendant grabbed and squeezed her breasts. This incident happened after [A.R.] turned thirteen years old.
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> Count 6 . . . Sexual Battery by an Authority Figure . . . . The defendant rubbed both of his hands over the breast[s] and genitals of [A.R.]. The defendant placed his hands under her shirt and under her bra and rubbed her breasts in a circular motion, directly on her skin, while she and the defendant were [lying] in bed together. This incident happened after [A.R.] turned thirteen years old.
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> Count 7 . . . Sexual Battery by an Authority Figure . . . . The defendant rubbed the buttocks of [A.R.]. The defendant got in bed with [A.R.], who was

[lying] on her side, and the defendant was behind her. The defendant, then, rubbed her buttocks over her clothes. And [A.R.] moved away from to stop the touching. This happened in the early morning hours, around 4 a.m. This happened – this incident happened after [A.R.] turned thirteen years old.

Count 8 . . . Sexual Battery by an Authority Figure . . . . The defendant fondled the breasts and genitals of [A.R.]. The defendant placed his hands over her breasts and squeezed her breasts, then moved his hand down and rubbed her genitals over her clothes. This happened while she and the defendant were [lying] in bed together in the early morning hours. This incident happened after [A.R.] turned thirteen years old.

Count 9 . . . Sexual Battery by an Authority Figure . . . . The defendant fondled the buttocks and breasts of [A.R.]. The defendant rubbed his hands over her buttocks and breasts while he was [lying] behind her. The defendant, then, [lay] on his back and began pleasuring himself, telling [A.R.] that it felt good and he wished he could come [inside] her. This happened while she and the defendant were [lying] in bed together in the early morning hours. This incident happened after [A.R.] turned thirteen years old

Count 10 . . . Sexual battery by an Authority Figure . . . . The defendant fondled the buttocks and genitals of [A.R.]. The defendant placed his hands under her pants and underpants and rubbed her buttocks, then moved his hand around the front of her pants and placed his hand on her pubic hair. The defendant attempted to move his hand lower, and [A.R.] pressed her legs tighter, together. This happened while she and the defendant were [lying] in bed, together, in the early morning hours. This incident happened after [A.R.] turned thirteen years old.

Count 11 was for sexual battery of B.M. The allegation involved one incident. Therefore, no election was needed.

On appeal, Appellant makes the same argument that he argued at trial that his Motion for Judgment of Acquittal should have been granted because of inconsistencies between the testimonies of various State witnesses. Appellant compares the testimony of A.R. with Ms. Proffitt, A.R.'s volleyball coach, and the testimony of A.R. and B.M. With regard to the testimonies of A.R. and Ms. Proffitt, the inconsistency that Appellant points out is that A.R. testified that she did not tell Ms. Proffitt that Appellant was touching her inappropriately and that Ms. Proffitt testified that A.R. told her that Appellant was touching her inappropriately on her buttocks and her breasts. With regard to A.R.'s and B.M.'s testimony, Appellant points to the fact that A.R. said Appellant's touching of B.M.'s buttocks was a harder spank, and B.M. testified that the spanking was not so hard that it hurt her.

Neither one of the purported inconsistencies in our view is enough to bring the evidence as a whole into question. A.R.'s confusion as to whether she told Ms. Proffitt does not bring into question whether Appellant inappropriately touched A.R. but rather, whether A.R. told her volleyball coach about the inappropriate touching. Likewise, the two victims' testimony differed in a description of how hard Appellant hit B.M.'s buttocks, not as to whether he actually touched her buttocks. Moreover, the reconciliation of inconsistent testimony is for the jury to resolve. *See Pruett*, 788 S.W.2d at 561.

Appellant also argues that his motion should have been granted because the State did not prove intent on the part of Appellant. In other words, the State did not prove that the touchings were for sexual gratification. For purposes of the offenses of which Appellant was convicted, sexual contact means, "the intentional touching of the victim's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can be reasonably construed as being *for the purpose of sexual arousal or gratification*." T.C.A. § 39-13-501(6) (emphasis added).

We initially point out that the State need only prove that the touchings can be *reasonably construed* as for the purpose of sexual arousal or gratification. *See State v. Wesley Earl Brown*, No. M2003-02804-CCA-R3-CD, 2005 WL 1412088, at *6 (Tenn. Crim. App., at Nashville, June 16, 2005), *perm. app. denied*, (Tenn. Dec. 5, 2005) (citing *State v. Roy Chisenhall*, No. M2003-00956-CCA-R3-CD, 2004 WL 1217118, at *3 (Tenn. Crim. App., at Nashville, June 3, 2004)). In addition, "jurors may use their common knowledge and experience in making a reasonable inferences from evidence." *State v. Meeks*, 876 S.W.2d 121, 131 (Tenn. Crim. App. 1993). In *State v. Hayes*, 899 S.W.2d 175 (Tenn. Crim. App. 1995), this Court observed that evidence that the touching of a victim's intimate parts was for sexual arousal or gratification is often proven by circumstantial evidence. 899 S.W.2d at 180.

In the case under review, the facts showed that the majority of these incidents occurred when A.R.'s mother was not present. B.M. was A.R.'s friend who was visiting and looking for a glass in the kitchen. Appellant smacked her buttocks with no provocation. Appellant smacked A.R. on the buttocks, grabbed her buttocks when he would hug her and even grabbed her breasts from behind. Many incidents occurred in A.R.'s bedroom while she was partially clothed or while she was wearing her pajamas in bed. He eventually started climbing into bed with her when she was in her pajamas and rubbing her breasts and buttocks both over and under her clothes, as well as touching her genitals both over and under her clothes. At one point, after rubbing her breasts and buttocks, Appellant rolled over and masturbated and told A.R. that he wanted to "come inside her" while making groaning noises and saying how good "it felt." This Court concludes that this evidence is legally sufficient for a jury to reasonably construe that Appellant was touching A.R. for sexual arousal or gratification.

In a case such as this, where A.R. and B.M., the victims, are the primary witnesses, whether there is sufficient evidence to support a conviction or a denial of a motion for judgment of acquittal boils down to credibility of the witnesses. As stated above, the credibility of the witnesses is an issue

for the trier of fact. *Pruett*, 788 S.W.2d at 561. We conclude that the trial court's denial of Appellant's Motion for Judgment of Acquittal was appropriate and was supported by the record.

This issue is without merit.

## Prosecutorial Misconduct

Appellant argues that the prosecutor engaged in misconduct in his examination of Appellant, John Klocko and A.R., and made improper comments in his closing argument. The State argues that Appellant failed to object at trial to the majority of the instances and when there was an objection, the trial court properly overruled the objection.

Appellant argues that the prosecutor acted improperly in his cross-examination of Appellant by asking Appellant whether the State's witnesses were lying during their testimony. He also complains about comments made during this same cross-examination that Appellant's "second defense" was to "trash your daughter."

### No Contemporaneous Objection

Appellant failed to contemporaneously object to the comments made by the prosecutor during the direct examination of Appellant and during closing argument and rebuttal argument. Typically when a prosecutor's statement is not the subject of a contemporaneous objection, the issue is waived. Tenn. R. Crim. P. 33 and 36(a); *see also State v. Thornton*, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999); *State v. Green*, 947 S.W.2d 186, 188 (Tenn. Crim. App. 1997); *State v. Little*, 854 S.W.2d 643, 651 (Tenn. Crim. App. 1992). Appellant did not object to the statements at trial. Thus, if this Court is to review the claims of prosecutorial misconduct we must do so through the process of "plain error" review embodied in Rule 52(b) of the Tennessee Rules of Criminal Procedure which provides, "An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice."[2]

This Court has, in its discretion, from time to time reviewed allegations of prosecutorial misconduct as "plain error" even in the absence of a contemporaneous objection. *See, e.g.*, *State v. Marshall*, 870 S.W.2d 532 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Carter*, 988 S.W.2d 145 (Tenn. 1999) (determining in absence of objection that prosecutor's jury argument was not plain error); *State v. Butler*, 795 S.W.2d 680 (Tenn. Crim. App. 1990) (considering whether statements of prosecutor were plain error despite lack of objection by defendant); *Anglin v. State*, 553 S.W.2d 616 (Tenn. Crim. App. 1977) (determining that in order to justify reversal on the basis

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2This rule by its terms allows plain error review only where there is a failure to allege error in the new trial motion or where the error is not raised before the appellate court. Nevertheless, the rule has been interpreted by the appellate courts to allow appellate review under some circumstances in the absence of a contemporaneous objection as well.

of improper argument and remarks of counsel in absence of objection, it must affirmatively appear that the improper conduct affected the verdict to the prejudice of the defendant). However, appellate courts are advised to use it sparingly in recognizing errors that have not been raised by the parties or have been waived due to a procedural default. *State v. Bledsoe*, 226 S.W.3d 349, 354 (Tenn. 2007).

In exercising our discretion as to whether plain error review under Rule 52(b) of the Tennessee Rules of Criminal Procedure is appropriate, the Tennessee Supreme Court has directed that we examine five factors: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the defendant must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (citing *State v. Adkisson*, 899 S.W.2d 626, 641 (Tenn. Crim. App. 1994)). All five (5) factors must be present for plain error review. *Smith*, 24 S.W.3d at 283.

For a "substantial right" of the accused to have been affected, the error must have prejudiced the appellant. In other words, it must have affected the outcome of the trial court proceedings. *United States v. Olano*, 507 U.S. 725, 732-37 (1993) (analyzing the substantially similar Rule 52(b) of the Federal Rule of Criminal Procedure); *Adkisson*, 899 S.W.2d at 642. This is the same type of inquiry as the harmless error analysis under Rule 36(b) of the Tennessee Rules of Appellate Procedure, but the appellant bears the burden of persuasion with respect to plain error claims. *See Olano*, 507 U.S. at 732-37.

In *State v. Bledsoe*, 226 S.W.3d 349 (Tenn. 2007), our supreme court recently revisited the question as to when an issue should be considered under the plain error doctrine. 226 S.W.3d at 353-55. In its analysis, the supreme court stressed that appellate courts should use plain error sparingly. *Id.* at 354. The court then stated the following:

> [A]n error "may be so plain as to be reviewable . . . , yet the error may be harmless and therefore not justify a reversal." *United States v. Lopez*, 575 F.2d 681, 685 (9th Cir. 1978); *see Adkisson*, 899 S.W.2d at 642. The magnitude of the error must have been so significant "'that it probably changed the outcome of the trial.'" *Adkisson*, 899 S.W.2d at 642 (quoting *United States v. Kerley*, 838 F.2d 932, 937 (7th Cir. 1988)); *see also United States v. Douglas*, 818 F.2d 1317, 1320 (7th Cir. 1987).
>
> It is the accused's burden to persuade an appellate court that the trial court committed plain error. *See Olano*, 507 U.S. at 734, 113 S. Ct. 1770. Further, our complete consideration of all five of the factors is not necessary when it is clear from the record that at least one of them cannot be satisfied. *Smith*, 24 S.W.3d at 283.

*Id.* at 354-55.

Direct Examination of A.R.

Appellant argues that the trial court erred in overruling his objection to the prosecutor's characterization that Appellant's lawyer accused A.R. of lying at her juvenile court proceedings. Appellant continues his argument in his brief and states, "The Defendant is entitled to a new trial because after the trial court overruled the Appellant's trial counsel's objection referenced in the preceding paragraph, the trial court admonished the assistant district attorney not [to] lead his witness. Despite this caution, the assistant district attorney proceeded with another leading question . . . ."

Appellant points to the following exchange between the prosecutor and A.R.:

> Q. In the deposition, when [Appellant's juvenile court proceedings counsel] was questioning you, how long did it go on there?
>
> A. Probably about two hours.
>
> Q. And repeatedly during the context of that, the attorney that represented your stepfather, [Appellant], just like [Appellant's attorney at trial], here, today, essentially, went through the same kind of question/answer about your background and problems that you had at home.
>
> A. Correct.
>
> Q. All in an effort to suggest to you –
>
> [Appellant's attorney at trial]: Your Honor, I'm going to object to that as misleading.
>
> The Court: It's redirect. It's a question related to what you've asked. So go ahead, please.
>
> [The State]: Was that –
>
> The Court: You need to ask her a question, not leading, since she's your witness.
>
> Q. [By State]: Was that done, [A.R.], in the context of accusing you of lying about all of these things that involved sexual touching with [Appellant]?
>
> A. Yes.

Q. Were you repeatedly told that or was that statement repeatedly made in your presence by [Appellant's juvenile court proceedings counsel] in those hearings?

A. Yes.

Q. That you were lying about this?

A. Yes.

Appellant did not renew his objection to this line of questioning.

Appellant and the State categorize and approach the argument on this issue as if the Appellant lodged a contemporaneous objection. Appellant bases his argument on the fact that the prosecutor asked leading questions following an admonishment by the trial court. However, Appellant never objected to the leading questions asked of the witness. Appellant objected to the fact that a question was "misleading." After the trial court, of its own accord, admonished the prosecutor not to lead, Appellant made no objection to the two or three leading questions asked thereafter. Therefore, there was no contemporaneous objection in line with his argument on appeal. We now analyze this issue to see if it was plain error. Appellant complains of, but did not contemporaneously object to, leading questions asked by the State. Because Appellant had just made an objection about the line of questions and the trial court had just admonished the prosecutor to not ask leading questions, we can only assume that Appellant's failure to object was a tactical decision. Appellant cannot meet all five factors required for plain error review. Therefore, we decline to conclude plain error exists.

Cross-examination of Appellant

With regard to the cross-examination of Appellant, the prosecutor couched numerous questions as accusations by Appellant that the State's witnesses were lying. The following exchange is one example cited by Appellant:

Q. Well, you want to convince [the jury] that [A.R.'s] lying about all of these things, so they shouldn't believe her and find you innocent, right?

A. That's the way it should be.

Q. You want to convince [the jury] that [L.R.], your wife, is lying about a lot of things. They shouldn't believe her. They should acquit you, right?

A. Yes, sir.

Q. You want to convince [the jury] that [B.M.] is lying in what she says happened.

A. She is lying.

Q. Okay. So you want to convince all of these people that everybody that walked in this courtroom to testify, [B.M.], [A.R.], [L.R.], they're all big, fat liars, and you're the one here, telling the truth, right?

A. At the beginning of this investigation –

Q. That's not what I asked, [Appellant]. Answer the question, please. Isn't that what you want the Jury to believe, right?

A. I'm innocent? Yes.

Q. That all of these other people are lying and you're telling the truth, right?

A. Yeah. Yes, sir.

The prosecutor then went on during cross-examination to question Appellant regarding specific allegations and facts testified to by the various State's witnesses. The prosecutor then asked Appellant if that particular witness was lying. Appellant would answer that the witnesses were lying. Appellant also takes issue with another exchange:

Q. Yeah. And your defense here is, essentially, two-fold. You get on the witness stand and say, I didn't do anything, right?

A. I didn't do anything.

Q. And the second defense is to, basically, trash your daughter. She's a liar, she's disrespectful. She wouldn't do the things we asked her to do. She had all of these problems at school, right?

A. Yes, sir. She had those.

There was no contemporaneous objection to any of these questions. Appellant argues that the State's cross-examination of Appellant led to an unfair trial because of the argumentative questioning.

In *State v. Baker*, 751 S.W.2d 154 (Tenn. Crim. App. 1987), this Court held that a prosecutor's questioning a defendant about whether the State's witness was lying in his testimony "did not detract from the fairness of the trial . . . ." 751 S.W.2d at 162. This Court also stated that "the cross-examination was inept, probably brought about by the zeal of the examiner . . . ." *Id.* However, this Court did not overturn the defendant's conviction based upon the prosecutor's improper questions. *Id.*

This Court revisited this issue in *State v. Charles Owens*, No. M2005-02571-CCA-R3-CD, 2007 WL 1094136 (Tenn. Crim. App., at Nashville, Apr. 12, 2007), *perm. app. denied* (Tenn. Aug 20, 2007). In *Charles Owens*, the prosecutor asked the defendant whether the child rape victim had lied and her mother had lied. 2007 WL 1094136, at *20. This Court stated that "the prosecutor was entitled to clarify on cross-examination whether Defendant maintained that [the victim, the police officer, and the victim's mother] were lying during the presentation of their testimony, or merely mistaken or inaccurate as to the details about which they testified." *Id.*

The same can be said in this case. During his direct examination, Appellant testified that he and his wife were having trouble with A.R. and issues of discipline. He stated on direct examination that he had to "get onto her about her lying . . . ." He also stated that he and his wife had spoken with A.R. about her untruthfulness. He testified to specific instances where A.R. had lied to him and his wife. Appellant also denied that he tried to touch A.R. on her breast or ever "tried to touch [A.R.] in a sexual manner." Appellant also denied getting into bed with A.R.. He stated, "I have never had sexual contact with [A.R.], period." Appellant also denied ever touching B.M. At the conclusion of direct examination, Appellant stated, "I'm innocent of these charges. I have never, ever touched [A.R.], sexually."

The prosecutor was entitled to clarify if Appellant was stating that all the witnesses were lying or mistaken as to the details. A similar analysis applies to the question regarding Appellant's characterization of A.R. as a liar and disrespectful. Appellant characterized A.R. as a child with behavior problems in an attempt to explain why she made the allegations against him. The prosecutor was entitled to clarify what Appellant saw as the reasons for A.R.'s problems.

Appellant has shown neither that a clear and unequivocal rule of law has been breached nor that this line of cross-examination changed the outcome of the trial. As stated above, Appellant had already testified to those allegations. The prosecutor was attempting to clarify Appellant's direct testimony. Because Appellant has been unable to show all five factors required for plain error review, we conclude he is not entitled to relief.

Closing Argument

In general, the scope of closing argument is subject to the trial court's discretion. Counsel for both the prosecution and the defense should be permitted wide latitude in arguing their cases to the jury. *State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn. 1998). However, argument must be temperate, "predicated on evidence introduced during the trial," and relevant to the issues being

tried. *State v. Keen*, 926 S.W.2d 727, 736 (Tenn. 1994). Thus, the State must not engage in argument designed to inflame the jurors and should restrict its comments to matters properly in evidence at trial. *State v. Hall*, 976 S.W.2d 121, 158 (Tenn. 1998).

In his brief, Appellant takes issue with the following comments made during the State's closing argument:

> I try these cases. This is all I do. The victims that I represent are the youngest victims in our community. Some are much younger than [A.R.] that we bring into court. . . .
>
> . . . .
>
> We tell them everyday, if something happens to you, you can come to us and tell us. We raise children in the belief, in the faith that if something important happens, they should be able to come to an adult who will do, what? Believe them. Believe them.
>
> And so I have an abiding faith that in my role as an Assistant District Attorney seeking justice on behalf of those children, that I will place that faith, that willingness to accept what they have to say in the hands of jurors.

To support his argument that the prosecutor injected his belief into his closing argument, Appellant cites to *United States v. Young*, 470 U.S. 1 (1985). In *Young*, the Supreme Court stated that "[p]rosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence." 470 U.S. at 7. The Court then quoted the American Bar Association Standards for Criminal Justice which stated that a prosecutor should not "'express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.'" *Id.* at 8 (quoting ABA Standards for Criminal Justice 3-5.8(b) (2d ed. 1980)).

The prosecutor's comments in this case did not express his personal belief or opinion as to the veracity of any witnesses or the guilt or innocence of Appellant.

In this case, the prosecutor did not use the words "believe" and "faith" to comment on the veracity of witnesses, but rather to encourage the jury to find young abuse victims truthful and state that he himself trusted the judicial system. Appellant has failed to prove that the argument changed the outcome of the trial or that the argument breached a clear and unequivocal rule of law. The use of the words "believe" and "faith" in an argument do not inherently make the argument improper so as to require the reversal of a conviction. Therefore, we conclude that plain error does not exist.

Rebuttal Argument

Appellant also appeals based upon the following statement made during the State's rebuttal at closing argument:

> Life experience that you know of, your human experience tells you that there's an awful lot that goes on in the community that involves molestations of kids, sexual abuse of kids that never gets reported. You can't turn on a television set without hearing about that. And you can't go through your life experiences without seeing that.

Appellant did not object to any of these comments in the State's rebuttal closing argument. Appellant argues that this statement was improper because a prosecutor "may not comment on crime control, playing on the juror's fears of rampant child sex abuse intending to inflame their passions to right the wrongs of child abuse."

It is not necessarily prosecutorial misconduct for a prosecutor to appeal to a jury to act as the community conscience. Although "prosecutors should exercise extreme caution when making any statement referring to the community interests of the jurors." *See State v. Pulliam*, 950 S.W.2d 360, 368 (Tenn. Crim. App. 1996) (quoting *United States v Solivan*, 937 F.2d 1146, 1154 (6th Cir. 1991)). The prosecutor's comments are statements of what is common knowledge to the average citizen. Therefore, we do not find these comments to be unduly inflammatory, and Appellant has not argued in what way these comments are inflammatory. For this reason, Appellant has not proven that this statement is so inflammatory that it altered the outcome of his trial. This statement does not breach a clear and unequivocal rule of law. We conclude that plain error does not exist.

Contemporaneous Objection

Appellant also argues that the prosecutor acted improperly during the cross-examination of Appellant's brother, John Klocko. Appellant objected to these two instances at trial. The State argues that the allegedly improper questions did not affect the verdict in Appellant's case.

When a defendant makes allegations of prosecutorial misconduct, on appeal, this Court reviews the record to see "whether such conduct could have affected the verdict to the prejudice of the defendant." *State v. Smith*, 803 S.W.2d 709, 710 (Tenn. Crim. App. 1990). In other words, it will be reversible error if the improper comments of the prosecutor were so improper or the argument so inflammatory that it affected the verdict. *See State v. Reid*, 164 S.W.3d 286, 344 (Tenn. 2005); *Harrington v. State*, 385 S.W.2d 758, 759 (Tenn. 1965). This court must consider the following five factors on appeal:

> "(1) the conduct complained of viewed in context and in light of the facts and circumstances of the case; (2) the curative measures undertaken by the Court and the

> prosecution; (3) the intent of the prosecutor in making the improper statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case."

*State v. Buck*, 670 S.W.2d 600, 609 (Tenn. 1984) (quoting *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)); *see also State v. Goltz*, 111 S.W.3d 1, 5-6 (Tenn. Crim. App. 2003).

Appellant argues that the prosecutor's examination of John Klocko was improper because he asked Mr. Klocko why Appellant did not tell Detective Zoccola that Mr. Klocko was present during the alleged incident involving B.M. and that a sexual assault did not occur. The following is the exchange between the prosecutor and Mr. Klocko during his cross-examination:

> Q. Okay. Now, after learning that you were there, did you ever look at – or listen to your brother's statement to the police when he was asked questions about the incident involving [B.M.]? Do you know what he said about that?
>
> A. I suppose he said he didn't.
>
> Q. Or that he said he couldn't remember whether it ever happened or not. Did you know that?
>
> A. No.
>
> Q. He never mentioned the fact that you were there and you were a potential witness about that. Why would that be?
>
> [Appellant's attorney]: Your Honor, I'm going to object. He's asking to get in the mind of –
>
> The Court: Do you know?
>
> A. [By Mr. John Klocko] Judge, what did he ask me?
>
> The Court: Restate the question.
>
> Q. [By the prosecutor] When your brother is questioned about the allegations involving [B.M.] by Detective Zoccola –
>
> A. Yeah.

Q. – he says, I don't remember anything like that happening. He doesn't make any mention of the fact that you would have been at the house that day. He doesn't mention anything about this so-called towel fight and all of this going on. Can you explain why your brother wouldn't have knowledge about that circumstance if you were there and witnessed the very same things that he saw that day?

[Appellant's attorney]: Judge, Your Honor –

The Court: He can answer it, if he knows. Do you?

A. [By John Klocko] I've – I really don't – I suppose being under stress and being so surprised about the allegations that they had [B.M.], that . . . .

Q. Well, that might be a good guess.

A. I was saying – I guess I'm saying that when I learned of the allegations that I never – I was there at the house and then – for the towel fighting, and that was it.

We conclude that the trial court did not err in allowing this question. The prosecutor's question was one to which the witness either knew the answer or did not know the answer. The trial court asked Mr. Klocko if he knew the answer to the question. At that point, the trial court allowed Mr. Klocko to answer either that he did know the answer or he did not know the answer. The conduct viewed in context and in light of the facts and circumstances of the case does not amount to prosecutorial misconduct. This question did not affect the verdict in this case. The witness was allowed to answer that he was not sure why Appellant forgot he was present at the time of the alleged incident involving B.M. This question was not so inflammatory or misleading that the jury would be swayed. This is especially true in light of the overwhelming evidence presented by three witnesses, A.R., B.M., L.R., who all testified to the facts in question.

Cumulative Effect

We conclude that the possible prosecutorial misconduct and improper statements do not have the cumulative effect such that the verdict was adversely affected. There was overwhelming evidence against Appellant based on the testimony of A.R., B.M., L.R., Ms. Moultrie, Ms. Proffitt and Detective Zoccola. Therefore, the improper comments are not enough to affect the verdict and warrant reversal of Appellant's convictions.

## Sentencing

Appellant appeals his sentence but does not contest the length of his sentences for his individual convictions. Appellant argues that the trial court erred in imposing consecutive sentencing. Appellant bases this issue on two arguments: (1) consecutive sentencing under the

Tennessee statute violates the Sixth Amendment under *Rita v. United States*, ___ U.S. ___, 127 S. Ct. 2456 (2007) and *California v. Cunningham*, 549 U.S. 270, 127 S. Ct. 856 (2007); and (2) the severity of the offenses did not warrant the imposition of consecutive sentences under Tennessee Code Annotated section 40-35-115(b)(5). The State argues that the consecutive sentencing under the Tennessee statute does not violate the Sixth Amendment and that the trial court correctly applied Tennessee Code Annotated section 40-35-115(b)(5).

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

We first address Appellant's argument that consecutive sentencing violates the Sixth Amendment to the United States Constitution. As stated above, Appellant bases his argument on *Rita* and *Cunningham*. We first point out that Appellant's reliance on *Rita* is misplaced. In *Rita*, the United States Supreme Court addressed the federal appellate courts use of a presumption of reasonableness standard in evaluating a district court sentence which fell within the properly calculated Federal Sentencing Guidelines. 127 S. Ct. at 2462. The Court went on to state that an appellate court's use of the presumption of reasonableness does not violate the Sixth Amendment, as contemplated in *Cunningham* and *Blakely v. Washington*, 542 U.S. 296 (2004), "even if it increases the likelihood that the judge, not the jury, will find 'sentencing facts' . . . ." *Rita*, 127 S. Ct. at 2465-66. *Rita* does not extend the *Blakely* and *Cunningham* line of cases with regard to the states' sentencing guidelines. Therefore, it does not apply to this case.

*Cunningham* is the most recent in a line of cases stemming from *Blakely*, which called in to question the sentencing statutes of several states, including Tennessee's, in which the trial court made factual findings when determining the length of a defendant's sentence that are to be reserved

for a jury.[3] The United States Supreme Court's decisions in *Blakely* and *Cunningham* do not affect our review of consecutive sentencing issues. Our supreme court has specifically noted that *Blakely* does not impact our consecutive sentencing scheme. *State v. Robinson*, 146 S.W.3d 469, 499 n.14 (Tenn. 2004). In addition, this Court has consistently found that *Blakely* does not affect consecutive sentencing determinations. *See*, *e.g.*, *State v. Jeffrey Ray McMahan*, No. E2007-00037-CCA-R3-CD, 2008 WL 465273, at * 3 (Tenn. Crim. App., at Knoxville, Feb. 21, 2009); *State v. John Britt*, No. W2006-01552-CCA-R3-CD, 2007 WL 4355480, at *13 (Tenn. Crim. App., at Jackson, Dec. 12, 2007)*perm. app. denied* (Tenn. Apr. 28, 2008); *State v. Earice Roberts*, No. W2003-02668-CCA-R3-CD, 2004 WL 2715316, at *15 (Tenn. Crim. App., Jackson, Nov. 23, 2004), *perm. app. denied* (Tenn. Mar. 21, 2005); *State v. Lawrence Warren Pierce*, No. M2003-01924-CCA-R3-CD, 2004 WL 2533794, at *16 (Tenn. Crim. App., Nashville, Nov. 9, 2004) *perm. app. denied* (Tenn. Feb. 28, 2005).

We now turn to Appellant's issue that the imposition of consecutive sentencing is not warranted in Appellant's case. A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that:

> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

[3] In response to the United States Supreme Court's decision in *Blakely*, the Tennessee General Assembly amended Tennessee Code Annotated section 40-35-210. This amendment became effective on June 7, 2005. The General Assembly also provided that this amendment would apply to defendants who committed a criminal offense on or after June 7, 2005. 2005 Tenn. Pub. Acts ch. 353, § 18. In addition, the legislation provides that a criminal defendant who committed a criminal offense on or after July 1, 1982, but is not sentenced until after June 7, 2005, may elect to be sentenced under these provisions by executing a waiver of their ex post facto protections. This new sentencing scheme has been cited with approval by the United States Supreme Court in *Cunningham*. 127 S. Ct. at 871, n.18. Appellant was sentenced on March 18, 2005, therefore, the newly-enacted statute does not apply to his case.

> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b). When imposing a consecutive sentence, a trial court should also consider general sentencing principles, which include whether or not the length of a sentence is justly deserved in relation to the seriousness of the offense. *See State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). The imposition of consecutive sentencing is in the discretion of the trial court. *See State v. Adams*, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997).

Appellant was convicted of three counts of aggravated sexual battery. The trial court sentenced Appellant to eight years, which was the minimum sentence, for each of his aggravated sexual battery convictions to be served at 100% as a violent offender. *See* T.C.A. § 40-35-501(I) (2006). The aggravated sexual battery sentences were ordered to be served concurrently to each other. Appellant was convicted of six counts of sexual battery by an authority figure. The trial court sentenced Appellant to three years, the minimum sentence, for each conviction of sexual battery by an authority figure. The first three-year sentence for sexual battery by an authority figure was ordered to be served consecutively to the aggravated sexual battery sentences. The second three-year sentence for sexual battery by an authority figure was ordered to be served consecutively to the first sexual battery by an authority figure sentence. The remaining sexual battery by an authority figure sentences were ordered to be served concurrently to the aggravated sexual battery sentences. Appellant's final conviction was for assault by offensive or provocative contact, and he was ordered to serve six months concurrently to the first count of aggravated sexual battery. Therefore, Appellant's effective sentence was fourteen years.

In this case, the trial court based the imposition of consecutive sentencing on Tennessee Code Annotated section 40-35-115(b)(5), more than two convictions of offenses involving child sexual abuse. The trial court made the following statement with regard to consecutive sentencing:

> The Court recognizes, also what [the State] was saying, that under Section 40-35-115 . . . that where a defendant is convicted of two or more offenses involving sexual abuse of a minor . . . that the Court may run some of those sentences consecutive to each other.

> And, the Court, in this case, is of the opinion . . . that while it's not going to run them all consecutive to each other, there could be and should be under the law . . . considering it all, trying to be as fair as I can with him and . . . the State . . . two of the sentences that will run consecutive to the others.
>
> I'm [going to] run the sentences on the first three counts, which are the more serious counts that have a sentence that has to be served at one hundred percent . . . the Court is [going to] run those sentences concurrent with each other. So, that will be a total of eight years, not twenty-four years or sixteen years.
>
> Counts Four, Five will run consecutive to each other and consecutive to Counts One, Two and Three. In other words, its an eight year sentence on Counts One through Three, three year sentences on – on Four and Five running consecutive and consecutive to the others.
>
> All the rest of the sentences are [going to] run concurrent. So, what it means is that this defendant is getting an eight year sentence on the more serious charges, aggravated sexual battery. All of them will run concurrent for a total of eight years, and that's at one hundred percent.
>
> The other two convictions, Counts Four and Five will be three years each. That's at thirty percent. And, those sentences will run consecutive to each other and concurrent sentences in One, Two and Three. All the remaining counts will run, and all the remaining sentence, will run . . . there's a six month sentence on Count Eleven . . . all other counts will run concurrently to this.
>
> That's the judgment of this Court. It's a sentence that the Court believes is appropriate under all the circumstances in this case.

Rule 32(c)(1) of the Tennessee Rules of Criminal Procedure requires that a trial court specify the reasons for imposing a consecutive sentence. As stated above, Tennessee Code Annotated section 40-35-115(b)(5) requires a trial court to consider "the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims; . . . ." Clearly, the trial court did not specify its reasons for imposing consecutive sentences as contemplated by Rule 32(c)(1) and Tennessee Code Annotated section 40-35-115(b)(5). For this reason, this record is inadequate for us to review the issue of the appropriateness of the imposition of consecutive sentencing. Therefore, we vacate Appellant's sentences and remand for a sentencing hearing. *See e.g.*, *State v. Crystal Antonette Delaney*, No. W2005-01459-CCA-R3-CD, 2006 WL 1215141, at *3 (Tenn. Crim. App., at Jackson, May 5, 2006) (remanding for resentencing based upon the trial court's failure to state basis for consecutive sentencing); *State v. James Vanover*, No. E2005-01192-CCA-R3-CD, 2006 WL 521496,

at *6 (Tenn. Crim. App., at Knoxville, Mar. 2, 2006) (remanding for resentencing hearing; the sentence was later affirmed upon appeal after the remand, *State v. James Vanover*, No. E2006-01342-CCA-R3-CD, 2007 WL 2323386 (Tenn. Crim. App., at Knoxville, Aug. 5, 2007)).

Therefore, we vacate the Appellant's sentences and remand for a sentencing hearing.

## CONCLUSION

For the reasons stated above, we affirm Appellant's convictions, vacate Appellant's sentences, and remand for resentencing.

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JERRY L. SMITH, JUDGE